

No. 89-284

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Supreme Court, U.S.  
**FILED**  
NOV 14 1989  
JOSEPH F. SPANIOLO, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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DENNIS LOFTUS, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION**

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18 pp

### **QUESTION PRESENTED**

Whether petitioners were entitled to obtain a declaratory judgment from the Tax Court under Section 7476 of the Internal Revenue Code with respect to the qualified status of the Brewery Workers Pension Fund, even though they were not participants in that fund.



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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 44a-45a) is unpublished, but the decision is noted at 872 F.2d 1021 (Table). The opinions of the Tax Court (Pet. App. 1a-22a, 23a-43a) are reported at 90 T.C. 845 and 90 T.C. 862, respectively.

## **JURISDICTION**

The judgment of the court of appeals was entered on January 25, 1989. A petition for rehearing was denied on March 20, 1989 (Pet. App. 46a). On May 19, 1989, Justice Marshall extended the time to petition for a writ of certiorari to and including July 17, 1989 (Pet. App. 48a). On July 11, 1989, Justice Marshall further extended the time to petition for a writ of certiorari to and including August 17, 1989,

and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

This case involves 10 petitions filed pursuant to Section 7476 of the Internal Revenue Code<sup>1</sup> seeking a ruling concerning the qualification for tax-favored treatment of a pension fund under the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829. Each petition sought a declaratory judgment that the Brewery Workers Pension Fund had been partially terminated and disqualified under Section 401(a) of the Code prior to its merger into the New York State Teamsters Conference Pension and Retirement Fund, and that the disqualified Brewery Workers Fund therefore could not properly be merged into the Teamsters Fund (Pet. App. 4a-5a, 26a-27a). In addition, five of the petitions sought a determination with respect to the continuing qualification of the Teamsters Fund following its merger with the Brewery Workers Fund (*id.* at 27a, 42a-43a).

1. The Teamsters Fund and the Brewery Workers Fund were both qualified, union-sponsored, multi-employer pension funds established to provide retirement benefits to participating union members under the terms of the collective bargaining agreements entered into between the employers of the participants and the respective unions. In 1973, the trustees of the Teamsters Fund and the trustees of the Brewery Workers Fund entered into a written agreement to merge the two funds. Before the merger was effected, however, the trustees of the Teamsters Fund learned that a major New York brewery was planning to close. The trustees of the Teamsters Fund concluded that this development made the merger less attractive—because the

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

closing would substantially reduce the amount of employer contributions available to pay the benefits provided under the Brewery Workers Fund but would not substantially reduce its benefit liabilities—and they refused to proceed with the merger. Pet. App. 5a, 27a.

The trustees of the Brewery Workers Fund thereafter brought suit in New York Supreme Court seeking specific performance of the merger agreement. On April 29, 1975, the trial court held that the merger agreement was binding and ordered the trustees of the Teamsters Fund to merge the two funds, and that order was affirmed on appeal. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 49 A.D. 2d 755, 374 N.Y.S. 2d 590 (2d Dept. 1975), leave to appeal denied, 38 N.Y. 2d 709, 346 N.E. 2d 558, 382 N.Y.S. 2d 1028 (1976). When the Teamsters Fund trustees nonetheless refused to treat the funds as merged, the trustees of the Brewery Workers Fund sought additional relief from the New York Supreme Court to compel the Teamsters Fund trustees to satisfy their obligations under the merger agreement. On April 12, 1977, that court entered an Order and Supplemental Judgment declaring that the Brewery Workers Fund was fully integrated into the Teamsters Fund as of December 1, 1976, and ordering the Teamsters Fund trustees to notify all participants in the Brewery Workers Fund of their rights and options under the agreement, to accept employer contributions on behalf of active participants in the Brewery Workers Fund, and to pay benefits to retired participants in the Brewery Workers Fund. This order also was affirmed on appeal. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 62 A.D. 2d 1046, 404 N.Y.S. 2d 158 (1978). Pet. App. 5a-6a, 8a-9a.<sup>2</sup>

<sup>2</sup> Subsequently, the Teamsters Fund trustees were held in contempt for failing to comply with this order. On several occasions, they were denied leave to move to vacate the 1975 judgment. Pet. App. 10a-11a.



2. The merger agreement required the trustees of the Teamsters Fund to seek a determination from the Internal Revenue Service that the merger would not affect the qualified status of the Teamsters Fund under Section 401(a) of the Code, and the agreement made the merger itself conditional on the receipt of a favorable determination letter. The Teamsters Fund trustees, however, did not fully cooperate with the representatives of the Brewery Workers Fund in seeking this determination letter. Nevertheless, counsel for the Brewery Workers Fund submitted an application to the IRS District Director in Buffalo, New York, for a determination letter with respect to the merged plans. Neither the trustees of, nor the participants in, the Teamsters Fund were notified of the filing of this application. Pet. App. 6a-7a, 28a-29a.

On September 28, 1976, the Buffalo District Director issued a favorable determination with respect to the qualification of the merged plans. When the trustees of the Teamsters Fund learned of this determination letter, they advised the District Director that the request had not been authorized by the Teamsters Fund and that neither the trustees nor any of the participants in the Teamsters Fund had been given notice of the filing of the application. Relying on Treas. Reg. § 1.7476-2, which requires that written notice be given to all persons who qualify as interested parties with respect to an application for a determination letter affecting the qualification of a retirement plan, the Teamsters Fund trustees requested the District Director to revoke the determination letter. Pet. App. 29a.

Responding to the District Director's request for technical advice, the National Office of the IRS advised that the Teamsters Fund and its participants were interested parties with respect to this application and hence should be given notice under the regulation. The technical advice memorandum further stated that the District Director should not

withdraw the outstanding determination letter, but that, after the Teamsters Fund and its participants had an opportunity to comment on it, he should reconsider the matter and take appropriate action. Thereafter, the Teamsters Fund trustees notified the participants in that fund that the determination letter previously issued with respect to the merged plans was being reconsidered, and some of the participants submitted comments. Following the expiration of the comment period, the District Director again determined that the merged plans were qualified under Section 401(a) of the Code and that the favorable determination issued on September 28, 1976, was correct. Pet. App. 7a, 29a.

3. In the meantime, "acting \* \* \* as successor in interest to the Brewery Workers Pension Fund" (Pet. App. 11a), the trustees of the Teamsters Fund submitted a determination letter request to the District Director of Internal Revenue in Brooklyn, New York, seeking a determination that the Brewery Workers Fund had suffered a disqualifying partial termination prior to the effective date of its merger into the Teamsters Fund. The District Director returned this application without action, requesting evidence that all interested parties had been notified of the request in accordance with Treas. Reg. § 1.7476-2. On December 26, 1978, the District Director, by letter, rejected the claim of the Teamsters Fund trustees that all the interested parties had been notified. Pet. App. 11a-12a, 33a-34a.

The Teamsters Fund and several of its participants thereafter filed petitions in the Tax Court seeking a declaratory judgment under Section 7476 of the Code that the December 26, 1978, determination letter with respect to the merged plans was invalid. The Tax Court dismissed those petitions, holding that the IRS's refusal to issue a determination was not reviewable because it was based on lack of adequate notice; it was not a "determination with respect to continuing qualification" (Pet. App. 12a, 35a)

that would be reviewable under Section 7476. The dismissals were affirmed by the Second Circuit. *Wenzel v. Commissioner*, 707 F.2d 694 (1983).

4. The trustees of the Teamsters Fund thereafter filed a new application with the Buffalo District Director seeking a determination that the Brewery Workers Fund had been partially terminated and disqualified prior to its merger into the Teamsters Fund and also a revocation of the September 28, 1976, determination letter that found the merged plans to be qualified. The application further requested that the District Director invoke the Commissioner's discretionary authority under Section 7805(b) of the Code to limit the retroactive effect of the proposed disqualification to the Brewery Workers Fund and thus not disqualify the Teamsters Fund.<sup>3</sup> Pet. App. 13a, 35a-37a.

On February 12, 1985, based upon advice received from the National Office after a conference held with Teamsters Fund representatives, the District Director issued a favorable determination letter with respect to the status of the Brewery Workers Fund prior to the merger. In that letter, he determined that the Brewery Workers Fund had experienced a partial termination prior to December 1, 1976, but that this partial termination required no additional vesting and had no adverse effect on the qualification of the plan, since all benefits under the Brewery Workers Fund at that time were vested to the extent funded. Pet. App. 13a-14a, 37a-38a, 70a-71a.

5. Petitioners, the trustees of the Teamsters Fund and eight individual participants, commenced the instant proceeding by filing petitions in the Tax Court seeking a declaratory judgment under Section 7476 that the IRS had

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<sup>3</sup> This determination letter request was forwarded to the National Office for technical advice. District Directors have not been delegated authority to act on requests for relief from retroactivity under Section 7805(b). Rev. Proc. 83-36, Sec. 17.04, 1983-1 C.B. 763, 772.

erred in its February 12, 1985, determination letter in finding that the Brewery Workers Fund was not disqualified before the merger. Petitioners also asserted that the District Director had improperly failed to make a determination with respect to the continuing qualification of the Teamsters Fund. The Tax Court dismissed the petitions for lack of jurisdiction (Pet. App. 1a-22a, 23a-43a).

The Tax Court held that the trustees of the Teamsters Fund, in their capacities as successors to the trustees of the Brewery Workers Fund, lacked standing to challenge the Commissioner's determination that the Brewery Workers Fund was qualified. It concluded that, since the District Director had issued an unconditional favorable determination with regard to the qualification of the Brewery Workers Fund, the trustees of that fund had no interest adversely affected by that determination. The court explained that the purpose of Section 7476 is to allow an interested party to challenge an unfavorable determination without having to risk disqualification; because the Commissioner's determination here was that the plan was qualified without any conditions imposed, there was no risk of disqualification that implicated the procedures of Section 7476. Accordingly, the Teamsters Fund trustees lacked standing under the statute to challenge that determination. Pet. App. 16a-19a.

The Tax Court also held that petitioners, in their capacities as trustees of the Teamsters Fund or as participants in that fund, lacked standing to challenge the determination with respect to the premerger status of the Brewery Workers Fund because they had not been either trustees or participants in the Brewery Workers Fund prior to the merger (Pet. App. 39a-41a). Finally, the Tax Court held that petitioners were not entitled to a declaratory judgment with respect to the continuing qualification of the Teamsters Fund (*id.* at 42a-43a). The court noted that petitioners had requested that the revocation of the 1976 determination be

limited to the merger amendment, but not extend to the entire Teamsters Fund. It characterized petitioners' request as "a 'backdoor' request for a determination that the Brewery Workers Fund, as it existed prior to the merger, was not qualified" (*id.* at 43a)—a request that the court had already concluded could not be made by petitioners.

The court of appeals affirmed in an unpublished opinion, "substantially for the reasons stated by" the Tax Court (Pet. App. 44a-45a).<sup>4</sup>

### ARGUMENT

The court of appeals correctly affirmed the Tax Court's dismissal of the petitions. Moreover, the court's decision, which is unpublished, does not conflict with any decision of this Court or of any other court of appeals, and it presents no broad legal issue for consideration by this Court. Petitioners' contention is simply that the Tax Court incorrectly applied the jurisdictional requirements of Section 7476 of the Code to the fairly unusual facts of this case, which petitioners themselves describe as a "unique set of circumstances" (Pet. 24). Plainly, there is no reason for review by this Court.

1. Section 7476(a) of the Code confers jurisdiction upon the Tax Court to enter a declaratory judgment "[i]n a case of actual controversy" involving certain determinations by the Commissioner with respect to the qualification of a retirement plan for tax-favored treatment under Section 401(a) of the Code. The legislative history of ERISA confirms the correctness of the Tax Court's finding that Congress intended to limit the use of this declaratory judgment

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<sup>4</sup> In addition to the actions described in the text, three other suits were brought in federal court by the Teamsters Fund or its participants to attempt to prevent or undo the merger. See Pet. App. 10a-11a, 32a-33a.



remedy to the resolution of disputes arising out of decisions by the Commissioner that are "adverse to the party petitioning in the Tax Court." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 331 (1974). In particular, the legislative history indicates that Congress contemplated the use of the declaratory judgment procedure by an applicant for a determination letter (usually the employer sponsoring the proposed plan) after he receives a determination from the IRS that his plan failed to qualify for the tax benefits available to "qualified plans" under Section 401(a) of the Code. See H.R. Rep. No. 807, 93d Cong., 2d Sess. 106 (1974).

Congress also designed Section 7476 to make the declaratory judgment procedure available to an individual employee, or to the union representing such an employee, if he is adversely affected by a determination regarding the qualification of his employer's plan, whether the determination is favorable or adverse to the requester. For example, a determination in favor of the sponsoring employer might be adverse to a particular employee if he is personally excluded from participation in the plan or if he is offered benefits that are less favorable than those offered to officers, shareholders, and highly compensated employees of the plan sponsor. In such cases, Congress intended to allow an employee who is excluded or discriminated against to file a petition for a declaratory judgment and to seek to prove either that his exclusion violates the minimum participation requirements of ERISA or that the benefit formula of the plan violates the anti-discrimination requirements of the law. See H.R. Rep. No. 807, *supra*, at 107-108; *Thompson v. Commissioner*, 71 T.C. 32, 38-39 (1978).

2. Petitioners do not appear to dispute here that the trustees of a plan have no basis for challenging a favorable determination of the plan's qualified status, and hence that the Tax Court correctly rejected the Teamsters Fund trustees' attempt to challenge the determination letter in

their capacities as successors to the trustees of the Brewery Workers Fund. They contend (Pet. 13-19) instead that the plan participant petitioners can challenge the determination. But the Tax Court correctly held that these plan participants did not qualify as "interested part[ies]" who could challenge the favorable determination under Section 7476. None of the petitioners had ever been a participant in the Brewery Workers Fund or had ever been employed by an employer contributing to that plan, and therefore they had no basis for challenging the determination that the plan was qualified prior to the merger. In permitting certain individuals to bring an action under Section 7476, Congress contemplated that such an individual "must have been an employee of the employer during the period for which he is questioning the qualification of the plan." S. Rep. No. 383, 93d Cong., 1st Sess. 115-116 (1973). Petitioners were not adversely affected by the Commissioner's determination in the sense contemplated by Congress; they were not excluded from participation in the Brewery Workers Fund nor were they discriminated against by that fund as a result of the Commissioner's determination. Petitioners simply were not within the class of persons affected by the plan whose status was under consideration, and Section 7476 does not confer upon them a right to challenge the Commissioner's determination in court. Compare *American New Covenant Church v. Commissioner*, 74 T.C. 293, 303-305 (1980) (involving I.R.C. § 7428).

Petitioners contend (Pet. 13-15) that the Teamsters Fund plan participants were adversely affected by the Commissioner's determination in this case because their retirement benefits were jeopardized by the merger, which would not have gone forward if the Brewery Workers Fund were disqualified. This contention rests on a fundamentally erroneous view of the scope and purpose of the Tax Court's declaratory judgment jurisdiction under Section 7476. That

Section authorizes Tax Court review of administrative determinations relating to the qualification of retirement plans under the provisions of ERISA. It is the Commissioner's determination that is under review, and therefore the only issues properly before the court in a declaratory judgment action are those issues that relate to the proper design of a qualified plan and that can be resolved based on the facts submitted by the plan sponsor at the time he requests the determination letter under review. H.R. Rep. No. 807, *supra*, at 108. Accordingly, alleged "operational" defects, such as the failure of a plan sponsor to fund the plan as required by Section 412 of the Code, are completely outside the scope of the declaratory judgment jurisdiction of the Tax Court. See *Thompson v. Commissioner*, 71 T.C. at 37-38.

Petitioners' claim that the merger of the Teamsters Fund and the Brewery Workers Fund will jeopardize the financial condition of the combined plans is an "operational" issue that is beyond the limited scope of the declaratory judgment jurisdiction of the Tax Court. Whether a plan is adequately funded cannot be determined at its inception, when the plan normally requests a determination letter; rather, that determination depends on the level of contributions to the plan over many years. See I.R.C. § 412(b)(2)(B). Thus, even if the amendment merging the Brewery Workers Fund into the Teamsters Fund had the effect of increasing the unfunded liabilities of the Teamsters Fund, that fact would not require the disqualification of either the Brewery Workers Fund or the Teamsters Fund; instead, the trustees of the Teamsters Fund would be required to seek additional contributions from the sponsoring employers through the collective bargaining process.<sup>5</sup> Accordingly, the alleged

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<sup>5</sup> The regulations under ERISA prescribe special rules for the amortization of losses incurred by a collectively bargained plan that is main-



injury caused to petitioners by the *merger* (see Pet. 26, cannot form the basis for jurisdiction under Section 7476 to challenge the premerger qualification of the Brewery Workers Fund.

3. The Tax Court also correctly rejected petitioners' attempt to invoke Section 7476 by objecting to the Commissioner's failure to issue a determination with respect to the continuing qualification of the Teamsters Fund as affected by the merger. Although petitioners couched this objection in terms of the qualification of the Teamsters Fund, the Tax Court was clearly correct in finding that this was a " 'backdoor' request" (Pet. App. 43a) for a determination regarding the Brewery Workers Fund so as to enable the Teamsters Fund to escape its obligations under the merger agreement. In their determination letter application, the Teamsters Fund trustees specifically sought relief from any adverse consequences to their own fund that might otherwise flow from the retroactive disqualification that they were requesting (see *id.* at 36a-37a). Thus, as the Tax Court held (*id.* at 43a), the "gravamen of their request" related only to the disqualification of the Brewery Workers Fund as it existed prior to the merger. Since the trustees had no standing to challenge directly the Commissioner's favorable determination that the Brewery Workers Fund was not disqualified prior to the merger, they should not be permitted

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tained under a legally binding agreement calling for contributions at a specified rate. See Treas. Reg. § 1.412(c)(1)-2. Under the so-called "shortfall method" authorized in the regulations, the amortization of actuarially determined plan costs that exceed the contributions available to fund them ordinarily may be deferred until the expiration of the contract establishing the contribution rate to be paid by the participating employers. Treas. Reg. § 1.412(c)(1)-2(g)(2). If there is a shortfall in one contract cycle, however, the amortization requirements of the shortfall method will have the effect of requiring increased contributions from the participating employers in the next contract cycle in order to maintain the same level of plan benefits.

to create a justiciable issue by disguising the same request as one for a determination with respect to the continuing qualification of their own plan — with any adverse consequences of that determination attaching only to the Brewery Workers Fund.<sup>6</sup>

In sum, the Tax Court correctly rejected petitioners' efforts to invoke Section 7476 as a means of avoiding their contractual obligations under the merger agreement. Petitioners' general complaint that they have been denied their day in court rings hollow when tested against the record of their repeated unsuccessful efforts in every available forum to defeat the merger between the Teamsters Fund and the Brewery Workers Fund. As the Tax Court aptly observed (Pet. App. 22a), "[t]he real controversy in these cases relates not to the Commissioner's determination, but to a merger contract gone sour." The Tax Court was never given jurisdiction over merger disputes of the kind presented here, and the courts below correctly rejected petitioners' attempt to invoke Section 7476 in their protracted effort to repudiate the merger with the Brewery Workers Fund.

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<sup>6</sup> Petitioners note (Pet. 19-22) that the Commissioner took the position in the Tax Court that the court did have jurisdiction over some of the issues raised in the petitions. See Pet. App. 50a-69a. It is clear, however, that the Commissioner's limited agreement with petitioners in the Tax Court could not operate to confer jurisdiction on the Tax Court. That jurisdiction is established by statute and cannot be expanded by agreement of the parties. See *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986); *Freedman v. Commissioner*, 71 T.C. 564, 568 (1979). Thus, regardless of the Commissioner's initial response to the motion to dismiss for lack of jurisdiction, the decision of the courts below that the petitions could not be entertained under Section 7476 stands or falls on its own merits. As we have explained, that decision is correct, and, in any event, does not present an issue warranting review by this Court.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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NOVEMBER 1989

